

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
BRIEF**





76-7566

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**UNITED STATES COURT OF APPEALS**

*for the*

**SECOND CIRCUIT**

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DANIEL H. OVERMYER and SHIRLEY OVERMYER,  
Plaintiffs-Appellants,  
-against-

FIDELITY AND DEPOSIT COMPANY OF MARYLAND,  
THE STATE OF NEW YORK, THOMAS J. DELANEY,  
EDWARD A. PICHLER, and ANDREW R. TYLER,  
Defendants-Appellees.

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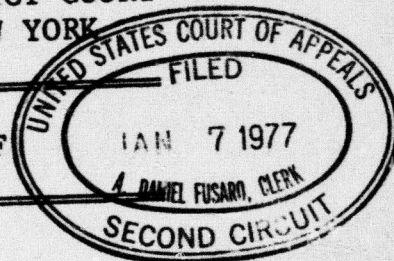
APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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PLAINTIFFS-APPELLANTS' BRIEF

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STATEMENT OF ISSUES

I. Are the New York statutes unconstitutional on their face?

II. Are the New York statutes unconstitutional as applied?

III. Are the constitutional questions presented substantial?

IV. Does the stay issued by Mr. Justice Marshall in Vail prohibit the plaintiffs herein from raising their constitutional objections to the New York statutes?

V. Does res judicata bar the present action?

VI. Does collateral estoppel bar the present action?

VII. Is a preliminary injunction warranted?



PRELIMINARY STATEMENT

The nature of the case is an action for declaratory and injunctive relief against the enforcement of New York State Judiciary Law §§ 756, 757, 765, 767, 769, 770, 771, 772, 773, 774 and 775 (herein called "the New York statutes"). Plaintiffs also seek damages against defendant FIDELITY AND DEPOSIT COMPANY OF MARYLAND ("FIDELITY") for its alleged fraud.

In the court below, plaintiffs moved for a preliminary injunction and defendant FIDELITY moved to dismiss the complaint. The Honorable Milton Pollack, District Judge, denied plaintiff's motion and granted defendant's motion. In a memorandum decision dated October 18, 1976, Judge Pollack held that the constitutional claims of the plaintiffs were frivolous, conclusory, and barred by res judicata.

### STATEMENT OF FACTS

In August, 1973, judgment was rendered by a Justice Court of Dallas, Texas, in favor of Eliot Realty, Incorporated, against Overmyer Distribution Services, Inc., for possession of real property. No money damages could be awarded at that time since the Justice Court did not have jurisdiction to award money damages. Overmyer Distribution Services, Inc., thereafter appealed the judgment to the County Court. In connection with this appeal, Overmyer Distribution Services, Inc., with defendant FIDELITY AND DEPOSIT COMPANY OF MARYLAND, ("FIDELITY") as surety, filed an appeal bond.

The County Court ruled that Eliot Realty, Incorporated, should have both possession of the premises and \$28,092.25 in damages.

Overmyer Distribution Services, Inc., then filed a Notice of Appeal and intended to prosecute the appeal to the applicable court. At about that time, however, D.H. Overmyer Co., Inc., (Ohio), a leading warehousing corporation with subsidiaries throughout the United States, filed a petition in Chapter XI. Not having confidence that they would be paid, the attorneys for Overmyer Distribution Services, Inc., were prepared to resign.



Without the approval, consent, or knowledge of Overmyer Distribution Services, Inc., defendant FIDELITY promised to pay the fees of the attorneys if they would continue in the case, purporting to act as attorneys for Overmyer Distribution Services, Inc., but in fact answerable only to FIDELITY. Upon instructions from FIDELITY, the attorneys negotiated a settlement with Eliot Realty, Incorporated, whereby FIDELITY would pay the judgment less a 10% discount. Thereafter, the attorneys discontinued the prosecution of the appeal and allowed the appeal to be dismissed. Overmyer Distribution Services, Inc., was unable to discover the facts behind the dismissal of its appeal and the bribery and control of its attorneys by FIDELITY until recently, as shall be explained.

FIDELITY brought an action in New York State based upon an alleged indemnity agreement which, it was claimed, entitled FIDELITY to reimbursement from DANIEL H. OVERMYER and SHIRLEY OVERMYER of the sum paid by FIDELITY in the Texas action. The defendants to the New York state action were Overmyer Distribution Services, Inc., DANIEL H. OVERMYER, and SHIRLEY OVERMYER. Based on certain factual omissions alleged to be fatal to FIDELITY's cause of action, a motion to dismiss the complaint was made. FIDELITY cross-moved for summary judgment.

Since no discovery had been instituted, DANIEL H. OVERMYER and SHIRLEY OVERMYER were ignorant of the substantial defenses that they might have presented. They were cognizant, however, that the proceedings in Texas, even as related by FIDELITY, appeared to be suspicious insofar as no stay on appeal was ever sought, as would normally happen, and the judgment was paid by FIDELITY before the appeal was discontinued.

In moving for summary judgment, FIDELITY did not disclose its secret promises concerning a payoff to effect the settlement but deceived the New York State Court by its fraudulent allegations that the money it paid was pursuant to the judgment of the Texas County Court, and not pursuant to its own clandestine settlement, as was the case. In the New York State Court, FIDELITY, swore that it was compelled to pay the Texas judgment, when actually all of the monies paid by FIDELITY were paid voluntarily as a settlement. FIDELITY concealed from the Courts in New York its control of the Texas attorneys purporting to represent Overmyer Distribution Services, Inc.. Indeed, FIDELITY had the monumental gall to state that it paid the money to Eliot Realty, Incorporated, "in good faith".

The facts of the Texas proceedings only came to light



in the Spring and Summer of 1976, when DANIEL H. OVERMYER and SHIRLEY OVERMYER learned about them from an attorney in Texas who is fully familiar with the facts, has reviewed the files in question, and has discussed the proceedings with the members of the law firm purporting to represent Overmyer Distribution Services, Inc. Thus it appears that DANIEL H. OVERMYER and SHIRLEY OVERMYER did not learn about these facts until after the judgment in New York state court was rendered against them, after appeals from the judgment were exhausted, after defendants had moved to vacate the judgment on other grounds, and after supplementary proceedings had been instituted.

Following the judgment in New York state court against DANIEL H. OVERMYER and SHIRLEY OVERMYER, but before the appeals from that judgment had been heard, FIDELITY sought to have DANIEL H. OVERMYER arrested and brought for an examination pursuant to New York State Judiciary Law §§756, 757, 767, 769, 770, 771, 772, 773, 774, and 775 (hereinafter called "the New York statutes"). DANIEL H. OVERMYER was unable because of his financial condition to post a supersedeas bond. When DANIEL H. OVERMYER failed to appear at an examination pursuant to the New York statutes, he was held in contempt and

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finēd. At the present time, defendant FIDELITY continues to demand that DANIEL H. OVERMYER be arrested and, in addition, the sheriffs who are parties to this action have been ordered by the Honorable Judge ANDREW R. TYLER to apprehend DANIEL H. OVERMYER and to compel him to appear for an examination.



THE NEW YORK STATUTES ARE  
UNCONSTITUTIONAL ON THEIR FACE.

The New York statutes,<sup>1</sup> are unconstitutional on their face for four reasons. First, they permit an adjudication of contempt and an order of imprisonment without an actual hearing. Second, they do not provide for adequate notice of the consequences of failure to appear at a show cause hearing. Third, they subject a defendant to imprisonment without informing him of his right to counsel. Fourth, the fines and imprisonment authorized by the statutes are punitive. Vail v. Quinlan 406 F.Supp.951(1975).

Under the New York statutes, a judgment debtor can be incarcerated solely on the basis of a creditor's affidavit of service and an ex parte proceeding. Yet the Supreme Court has held that "if confinement is to rest on a theory of civil

<sup>1</sup> New York State Judiciary Law §§ 756,757,765,767, 769,770,771,772,773,774 and 775. It should also be noted that CPLR §§ 5223 and 5251 authorizing the issuance of a subpoena for post-judgment disclosure and making the failure to comply with the subpoena punishable as a contempt of court are necessarily affected by the validity or invalidity of the named sections of the Judiciary Law. "Since the CPLR does not contain any procedure for contempt proceedings it must be assumed that the Judiciary Law provisions also apply..."Weinstein,Korn, and Miller, New York Civil Practice,§5251.01 ftn 1.See also David D. Siegel, Supplementary Practice Commentaries to CPLR §5251 (1967), McKinney's Consolidated Laws of New York Annotated.



contempt, then due process requires a hearing to determine whether petitioner has in fact behaved in a manner that amounts to contempt". McNeil v. Patuxent Institution Director, 407 U.S. 245, 92 S.Ct. 2083, 32 L.Ed. 2d 719 (1972). The fact that a hearing may be held after imprisonment does not satisfy the requirements of due process. Fuentes v. Shevin 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed. 2d 556 reh. den. 409 U.S. 902 (1972); Desmond v. Hachey 315 F. Supp. 328 (D.Me., 1970).

The New York statutes fail to require ~~that~~ the defendant receive adequate notice of the consequences of a failure to attend a show cause hearing. Yet it is fundamental to due process that notice be given "at a meaningful time and in a meaningful manner". Armstrong v. Manzo 380 U.S. 545, 85 S.Ct. 1187, 14 L.Ed. 2d 62 (1965); Mullane v. Central Hanover Bank & Trust Co. 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950). In many cases, judgment debtors fail to perceive the distinction between a show cause order and just another dunning collection letter. See Alderman, Imprisonment for Debt: Default Judgments, the Contempt Power & the Effectiveness of Notice Provisions in the State of New York, 24 Syracuse Law Review 1217 (1973). Hence the notice that is given under the New York statutes does not serve its purpose, is not reasonably calculated to give notice, and is not meaningful.



It has been held that the right to counsel extends to civil contempt proceedings. United States v. Sun Kung Kang 468 F. 2d 1368 (9th Cir., 1972). In order to assure that the defendants are able to exercise this fundamental right, they should be notified that they may retain counsel and that counsel may be appointed for them if they are indigent. Since the New York statutes fail to require such notification, they do not meet the standards of due process.

Finally, the New York statutes permit the imposition of a fine of \$250.00 even where the creditor is unable to show that any injury has resulted from the alleged contempt. The statutes permit the arrest and imprisonment of a debtor for failure to pay the fine regardless of whether or not he is in fact capable of paying it.

Whenever the arbitrary fine of \$250.00 is imposed on a debtor who cannot muster \$250.00 and is thereby jailed, the fine is neither compensatory nor coercive, but merely punitive. Such a fine contravenes basic legal principles Sunbeam Corporation v. Golden Rule Appliance Co. 252 F. 2d 467, (2d Cir., 1958) and deprives indigent contemnors of equal protection of the laws. Williams v. Illinois 399 U.S. 235, 90 S. Ct. 2018, 26 L.Ed 2d 586, (1970). See also United States v. United Mine Workers of America 330 U.S. 258, 67 S. Ct. 677,

91 L.Ed. 884 (1947).

Since the New York statutes violate due process, the right to counsel, and the equal protection of the laws, the statutes are unconstitutional on their face and an injunction against their enforcement is proper.



THE NEW YORK STATUTES ARE  
UNCONSTITUTIONAL AS APPLIED.

Even if one assumes for the purpose of argument that the New York statutes are constitutional on their face, nevertheless the plaintiffs maintain that under the circumstances of their particular case the enforcement of the New York statutes operates to deny their constitutional rights. See Boddie v. Connecticut 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed 2d 113 (1971); Sherbert v. Verner 374 U.S. 398, 83 S.Ct. 1790, 10 L. Ed. 2d 965 (1963).

As related in the complaint, the facts behind the present controversy indicate that the plaintiffs were denied that due process of law that is guaranteed by the Fourteenth Amendment. First, FIDELITY improperly induced the attorneys for Overmyer Distribution Services, Inc., into settling a lawsuit in Texas rather than opposing it. Thereafter, FIDELITY brought suit in New York state court against Overmyer Distribution Services, Inc., and the individual plaintiffs DANIEL H. OVERMYER and SHIRLEY OVERMYER. In this action, FIDELITY not only concealed the impropriety regarding the creation of the underlying liability in Texas, but FIDELITY affirmatively deceived the court by alleging conclusions which it knew to

be completely false. Based upon these fraudulent omissions and misstatements, the state court granted summary judgment for FIDELITY without ever according the plaintiffs herein the opportunity to conduct discovery. Consequently, the plaintiffs remained ignorant of the facts and were never afforded a fair opportunity to litigate their defenses on the merits.

The allegations of the plaintiffs herein are analogous to those made in the case of Jenkins v. McKeithen 395 U.S.411, 89 S.Ct. 1843, 23 L.Ed. 2d 404 (1969) where

the complaint alleged that appellees and their agents, acting under color of law and in conspiracy, procured false statements of criminal activities and used such statements to initiate baseless criminal proceedings against appellant, that they intimidated and coerced public officials into filing and prosecuting false criminal charges against appellant, and that they knowingly, willfully, and purposefully intimidated state court judges having under consideration legal controversies involving appellant. These acts of appellees allegedly deprived appellant and all others similarly situated of "rights, privileges and immunities secured to them by the Constitution and laws of the United States."

It has been recognized that unconstitutional procedures may have an impact "too pervasive to admit of confinement to particular issues or particular cases." Peters v. Kiff 407 U.S. 493, 92 S.Ct. 2163, 33 L.Ed. 2d 83 (1972). Here, the fraud and wrongdoing of FIDELITY cannot be merely confined to the proceedings in Texas. By these acts and their con-



cealment thereof, FIDELITY effectively deprived the plaintiffs of their day in court.

As the Supreme Court had occasion to note in Fuentes v. Shevin 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972) reh. den. 409 U.S. 902, "fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights..." DANIEL H. OVERMYER and SHIRLEY OVERMYER were entitled to present their cause to an impartial tribunal, "wholly disinterested", possessing the "calm detachment necessary for fair adjudication." Mayberry v. Pennsylvania 400 U.S. 455, 91 S. Ct. 499, 27 L.Ed. 2d 532 (1971). By its fraud, FIDELITY deprived the plaintiffs of that right. It is not enough that the plaintiffs received the outward trappings of a lawsuit, such as pleadings, motions, and affidavits. Due process is governed by substance, not form. Bell v. Burson 402 U.S. 535, 541, 91 S.Ct. 1586, 29 L.Ed. 2d 90, 95 (1971).

The defendant FIDELITY now seeks the arrest of plaintiff DANIEL H. OVERMYER based upon the New York state statutes relating to supplementary proceedings. The Honorable ANDREW R. TYLER has issued an order directing sheriffs including the defendant sheriffs THOMAS J. DELANEY & EDWARD A. PICHLER to apprehend DANIEL H. OVERMYER and bring him to an examination. Yet the plaintiff DANIEL H. OVERMYER has never had a hearing at which

he could present evidence to show that FIDELITY is not entitled to such an examination.

"If the right to notice and a hearing is to serve its full purpose, . . . it is clear that it must be granted at a time when the deprivation can still be prevented."

Fuentes v. Shevin 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed. 2d 556

(1972) reh. den. 409 U.S. 902. Moreover, the hearing that is

required by due process must be "meaningful." North Georgia

Finishing v. Di-Chem. 419 U.S. 601, 95 S.Ct. 719, 42 L.Ed.

2d 751 (1975); Goldberg v. Kelly, 397 U.S. 254, 90 S. Ct.

1011, 25 L.Ed. 2d 287 (1970); Sniadach v. Family Finance Corp.

395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed. 2d 349 (1969). In the

present instance the hearing was not meaningful, because

the pervasive fraud of FIDELITY prevented the plaintiffs

and the Court from learning the truth.

It can hardly be argued that an arrest is not a deprivation, or that the right to liberty receives less protection under the Fourteenth Amendment than the right to property. Thus, it is submitted that the plaintiff DANIEL H. OVERMYER is entitled to a hearing before being subjected to arrest. North Georgia Finishing v. Di-Chem. 419 U.S. 601, 95 S.Ct. 719, 42 L.Ed. 2d 751 (1975); Fuentes v. Shevin 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed. 2d 556 (1972) reh. den. 409



U.S. 902; Goldberg v. Kelly 397 U.S. 254, 90 S. Ct. 1011, 25 L.Ed. 2d 287 (1970); Sniadach v. Family Finance Corp. 395 U.S. 337, 89 S. Ct. 1820, 23 L.Ed. 2d 349 (1969).

It is now settled that the constitutional right to counsel applies to civil contempt proceedings. United States v. Sun Kung Kang 468 F. 2d 1369 (9th Cir., 1972). As the Supreme Court has had occasion to note, the "assistance of counsel is often a requisite to the very existence of a fair trial." Argersinger v. Hamlin 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed. 2d 530 (1972). When FIDELITY by its secret negotiations achieved control of the counsel in Texas, Overmyer Distribution Services, Inc., was deprived of the assistance of counsel. Consequently, the payment of money in Texas upon which FIDELITY later based its action in New York only occurred because of the wrongdoing of FIDELITY. Appealing to the avarice of the attorneys and playing upon a preoccupation with their fee, FIDELITY influenced them to forsake their ethical duties under Canons One, Two and Five of the Code of Professional Responsibility<sup>1</sup> and to disregard

<sup>1</sup> Particularly relevant in this connection is EC 2-21 which provides: "A lawyer should not accept compensation or any thing of value incident to his employment or services from one other than his client without the knowledge and consent of his client after full disclosure."

a client thought to be floundering on the brink of insolvency.

The fact that FIDELITY has chosen to pursue the individuals, DANIEL H. OVERMYER and SHIRLEY OVERMYER, rather than the corporation, Overmyer Distribution Services, Inc., does not preclude inquiry into FIDELITY's misconduct. Jenkins v. McKeithen 395 U.S. 411, 89 S. Ct. 1843, 23 L.Ed. 2d 404 (1969) shows that "the personal and economic consequences" suffered by the plaintiffs "are sufficient to meet the requirement that appellant prove a legally redressable injury." The Court in Jenkins stated: "It is no answer that the Commission has not itself tried to impose any direct sanctions on appellant; it is enough that the Commission's alleged action will have a substantial impact on him." As the background of the instant case establishes, the deprivation of counsel in Texas and the subsequent cover-up has had "a substantial impact" on the plaintiffs.

In a landmark case defining the requirement of standing, the Court ruled that the party seeking relief must allege "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the Court so largely depends for illumination of difficult constitutional questions. . . ." Baker v. Carr 369 U.S. 186, 204, 82 S. Ct. 691, 7 L. Ed. 2d



663, 667 (1962).

By the fact that FIDELITY has pursued only the individuals rather than the corporation, it is apparent that FIDELITY wishes to escape any inquiry into its conduct in Texas. However, the individuals who are plaintiffs in this action have shown a personal stake in the controversy and have demonstrated that FIDELITY's actions were "the direct cause of sufficient injury" to their financial interests. Peters v. Kiff 407 U.S. 493, 92 S. Ct. 2163, 33 L.Ed. 2d 83 (1972); Jenkins v. McKeithen 395 U.S. 411, 89 S. Ct. 1843, 23 L.Ed. 2d 404 (1969); Barrows v. Jackson 346 U.S. 249, 73 S.Ct. 1030, 97 L.Ed. 1586, (1952).

The other constitutional claims advanced by the plaintiffs are sufficient to warrant the convening of a three-judge court. The complaint alleges that the defendants threaten a seizure of property without probable cause in contravention of the Fourth and Fourteenth Amendments. If, as alleged, FIDELITY is not "an aggrieved party", then no probable cause exists and the plaintiffs ought to prevail on this claim. Similarly, the punishment of DANIEL H. OVERMYER for contempt while his appeal was pending in state court was unconstitutional in that it worked an invidious discrimination against an individual who lacked the financial wherewithal to post a

supersede<sup>as</sup> bond. Griffin v. Illinois 351 U.S. 12, 76 S. Ct. 585, 100 L. Ed. 891 (1955); Boddie v. Connecticut 401 U.S. 371, 91 S. Ct. 780, 28, L.Ed. 2d 113 (1971). Finally, a deprivation of the plaintiffs' constitutional right to travel Crandall v. Nevada 6 Wall. (U.S.) 35, 8 L. Ed. 745, (1868) by subjecting them to arrest, without a prior hearing on the merits, constitutes cruel and unusual punishment. See McNeil v. Patuxent Institution Director 407 U.S. 245, 92 S. Ct. 2083, 32 L.Ed. 2d 719 (1972). The deprivation of the right to free movement, although it may be minimal, is not constitutionally permissible without notice and a meaningful hearing. North Georgia Finishing v. Di-Chem, 419 U.S. 601, 95 S. Ct. 719, 42 L.Ed. 2d 751 (1975); Fuentes v. Shevin 407 U.S. 67, 92 S. Ct. 1983, 32 L.Ed. 2d 556 (1972) reh. den. 409 U.S. 902; McNeil v. Patuxent Institution Director 407 U.S. 245, 92 S. Ct. 2083, 32 L.Ed. 2d 719 (1972); Goldberg v. Kelly 397 U.S. 254, 90S. Ct. 1011, 25 L. Ed. 2d 287 (1970); Sniadach v. Family Finance Corp. 395 U.S. 337, 89 S. Ct. 1820, 23 L.Ed. 2d 349 (1969); Fisher v. Marubeni Cotton Corp. 526 F. 2d 1238 (8th Cir., 1975); Vail v. Quinlan 406 F. Supp. 951, (1975); Desmond v. Hachey 315 F. Supp. 328 (D. Me., 1970).



SINCE THE CONSTITUTIONAL QUESTIONS  
PRESENTED ARE SUBSTANTIAL, THE  
DISTRICT COURT ERRED IN DISMISSING  
THE COMPLAINT.

The relief sought in the present action is warranted under recent cases decided by the Supreme Court of the United States. Moreover, the Supreme Court is now in the process of deciding the analogous case of Vail v. Juidice No. A-683.

( Lower Court Vail v. Quinlan). A three-judge Court should be convened under 28 U.S.C. §§2281 and 2284, since the statutory prerequisite of a "substantial constitutional question" is satisfied.<sup>1</sup>

The Supreme Court aptly summarized its decisions on this point in Goesby v. Osser 409 U.S. 512, 93 S.Ct. 854, 35 L.Ed. 2d 36 (1973):

"Constitutional insubstantiality" for this purpose has been equated with such concepts as "essentially fictitious"; "wholly insubstantial"; "obviously frivolous"; and "obviously without merit". The limiting words "wholly" and "obviously" have cogent legal significance. In the context of the effect of prior decisions upon the substantiality of constitutional claims, those words import that claims are constitutionally insubstantial only if the prior decisions inescapable render the claims frivolous; previous decisions that merely render claims of doubtful or questionable merit do not render them insubstantial for the purposes of 28 U.S.C. §2281.

<sup>1</sup> Since the complaint herein was filed in June, 1976, P.L. 94-381 (S.537), August 12, 1976, does not apply.



A claim is insubstantial only if "its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy." [citations omitted].

The claims of the plaintiffs herein are not foreclosed from argument and indeed analogous claims have recently been heard by the Supreme Court in Vail v. Juidice. Yet should the Supreme Court hold even in Vail that the New York statutes are constitutional on their face, the present action would not be foreclosed from argument inasmuch as it involves a substantial claim that the New York statutes as applied to the plaintiffs are unconstitutional.

THE STAY ISSUED BY MR. JUSTICE MARSHALL  
IN VAIL DOES NOT PROHIBIT THE PLAINTIFFS  
HEREIN FROM RAISING THEIR CONSTITUTIONAL  
OBJECTIONS TO THE NEW YORK STATUTES.

It is true that the judgment of the Court in Vail v. Quinlan 387 F. Supp. 630 (1975) was stayed by Mr. Justice Thurgood Marshall pending review by the Supreme Court. However, the effect of this stay is merely to return the parties to where they stood before the decision in Vail v. Quinlan. Haywood v. National Basketball Association 401 U.S. 1204, 91 S.Ct. 672, 28 L.Ed. 2d 206 (1971); Pettway v. American Cast Iron Pipe Co. 411 F. 2d 998 (5th Cir., 1969) reh. den. 415 F. 2d 1376; Ideal Toy Corporation v. Sayco Doll Corporation 302 F. 2d 623 (2nd Cir., 1962); CMAX, Inc. v. Hall 300 F. 2d 265 (9th Cir., 1962). At that point, nothing prevented an individual from attacking the New York statutes both on their face and as applied. Nothing prevents such an attack now.

Vail v. Quinlan was brought as a class action and therefore that decision had ramifications throughout the state of New York. It does not follow that, merely because the operation of an injunction in favor of a whole class has been



dissolved, no individual parties can show circumstances or give reasons why they in particular should not be granted an injunction. Natal v. Louisiana 123 U.S. 516, 8 S. Ct., 253, 31 L.Ed. 233 (1887). See also Berger-Tilles Leasing Corp. v. York Associates, Inc. 28 A.D. 2d 1132, 284 N.Y.S. 2d 486; 1 C.J.S. Actions §137 and cases there cited.

While it may be that an injunction in favor of all the inhabitants of New York State restraining state officers from a particular practice may not be appropriate, yet perhaps an injunction in favor of DANIEL H. OVERMYER and SHIRLEY OVERMYER is wholly appropriate. It is axiomatic that a statute that is constitutional on its face may, as applied in a particular instance, infringe upon the constitutional rights of an individual. Boddie v. Connecticut 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed. 2d 113 (1971); Sherbert v. Verner 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed. 2d 965 (1963). In addition, the certification of a class may eventually be denied on grounds that the plaintiffs lack standing, that the plaintiffs do not adequately represent the class, that the class is not sufficiently numerous, that significantly diverse questions of law or fact exist, or that the claims of the representative parties are not typical of the claims of the class. Although



a class action may not be maintained, individuals may nonetheless raise their substantive constitutional claims and may prevail on them.

The mere fact that Mr. Justice Marshall issued a stay of Vail v. Quinlan should not be construed as a finding that the laws in question are or are not constitutional. A finding of ~~that~~ nature will be made by the entire Supreme Court. Nor should Mr. Justice Marshall's opinion be construed as prohibiting any further attack by anyone on the New York statutes. Natal v. Louisiana 123 U.S. 516, 8 S. Ct. 253, 31 L.Ed. 233 (1887). If the New York statutes are unconstitutional, there is nothing in the order of Mr. Justice Marshall that sanctions their operation, even for a temporary period. Mr. Justice Marshall does not express an opinion as to the constitutionality of the New York statutes. He has merely exercised his judgment and discretion to protect the rights of the parties pending appeal. Haywood v. National Basketball Association 401 U.S. 1204, 91 S. Ct. 672, 28 L.Ed. 2d 206 (1971). See also Comment, Emergency Jurisprudence, 69 Nw. U.L.Rev. 436 (1974).

Consequently, the effect of the stay granted by Mr. Justice Marshall is merely to return the parties to where they stood before the Court in Vail v. Quinlan issued its

injunction. Nothing prevents the plaintiffs herein from contending that the New York statutes are unconstitutional on their face and as applied. Boddie v. Connecticut 401 U.S. 371, 91 S. Ct. 780, 28 L.Ed. 2d 113 (1971); Natal v. Louisiana 123 U.S. 516, 8 S. Ct. 253, 31 L.Ed. 233 (1887).



RES JUDICATA DOES NOT  
BAR THE PRESENT ACTION.

The doctrine of res judicata applies only where the causes of action in the first and the second suit are identical. Sea-Land Services v. Gaudet 414 U.S. 573, 94 S.Ct. 806, 39 L.Ed. 2d 9 (1974); United Shoe Machinery Corp. v. United States 258 U.S. 454, 66 L.Ed. 708 (1921). To determine whether the causes of action are the same, it is helpful to examine the issues raised, the relief sought, and the evidence needed to establish the right to recovery. When the state court action and the federal action are thus analyzed, it is manifest that the causes of action are not identical.

In state court, the issues that were raised chiefly relate to the alleged indemnity contract. In federal court, the issues that are raised chiefly relate to the constitutionality of statutes. In state court, FIDELITY sought a money judgment. In federal court, the plaintiffs seek to vindicate constitutional rights. The state court action was based on a contract. The federal court action is based on a federal statute and the law of torts. In state court, the parties were allegedly privy to an indemnity contract. In federal court, the parties include the STATE OF NEW YORK and certain state officers. The

facts that gave rise to the state action were the execution of an alleged contract. The facts that give rise to the federal action are the fraud, apparent bribery of attorneys and violation of civil rights by defendant FIDELITY and the impending use of supplementary proceedings under New York law by defendants STATE OF NEW YORK, THOMAS J. DELANEY, EDWARD A. PICHLER, and ANDREW R. TYLER, as well as by defendant FIDELITY.

Therefore, the District Court committed error in holding that the causes of action in both courts are identical.

Numerous cases bear witness to the fact that the federal remedy under 42 U.S.C. §1983 is supplementary to the state remedy. Monroe v. Pape 365 U.S. 167, 183, 81 S.Ct. 473, 482, 5 L.Ed. 2d 492, (1961); Lane v. Wilson 307 U.S. 268, 274, 59 S.Ct. 872, 83 L.Ed. 1281 (1939); Lombard v. Board of Education of City of New York 502 F. 2d 631 (2d Cir., 1974) cert. den. 422 U.S. 1007; Newman v. Board of Education of City School District of New York 508 F. 2d 277 (2d Cir., 1975) cert. den. 420 U.S. 1004. In actions under the Civil Rights Act (42 U.S.C. §1983) the legislative history and clear intent of the statute mandate that the plaintiff's right to choose his forum for the litigation of constitutional issues be accorded protection.



Lombard v. Board of Education of City of New York 502

F. 2d 631 (2d Cir., 1974) cert. den. 422 U.S. 1007 aptly illustrates the doctrine of choice of forum. Lombard, a teacher, was accused by the Board of Education of being paranoid, mentally incompetent, and unfit for duty. Without a hearing, he was placed on an involuntary leave of absence and subsequently dismissed. Lombard brought proceedings in state court and made three arguments. First, the Board of Education violated its own by-laws by forcing him to take a leave of absence without pay when he still had sick leave. Second, the Board of Education delayed the termination of his probationary appointment until after he had actually completed his probationary appointment; hence the Board's termination was contrary to law. Finally, he argued that the unsatisfactory rating which was given to him by the Board of Education was arbitrary and capricious. The state court dismissed the petitions of Lombard.

Thereafter, Lombard brought an action in federal court alleging that the Board of Education violated his constitutional right to due process by stigmatizing him as mentally unfit without according him a full hearing. The District Court dismissed the claim on the ground that it is barred by res judicata, and Lombard appealed. The Court of Appeals

reversed, giving three policy considerations that it considered paramount.

First, the Civil Rights Act (42 U.S.C. §1983) was originally passed as a response to abuse of power by the states. Monroe v. Pape 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed. 2d 492 (1961). Contemplating the possibility that the plaintiff might not be able to obtain a fair hearing in state court, the Act provides a federal remedy which is supplementary to the state remedy.

Second, it frequently happens that a plaintiff aggrieved by a particular state statute possesses a cause of action that combines a constitutional issue with an issue of statutory construction. Should the plaintiff bring a federal court action in the first instance, the court might well abstain on the ground that the issue of statutory construction ought to be brought in state court. The plaintiff would thus be forced to seek relief in the state court. But Monroe v. Pape addresses itself to a situation where the state tramples on the rights of individuals. If the legislative and executive officers of the state so little respect the Constitution that they would pass and enforce a blatantly unconstitutional statute, then one would hardly be astonished when the judicial officers of the state characterize the



statute as lawful and appropriate. To restrict the plaintiff to a state remedy in such an instance would be to subject essential human rights to the quantum of protection existing before the passage of the Fourteenth Amendment when the individual states had the power to deny every liberty in the Bill of Rights.

Lastly, Lombard v. Board of Education makes the realistic observation that all unconstitutional state judgments are not redressable via certiorari. When a plaintiff is restricted to his miniscule, negligible possibility of obtaining a writ of certiorari, it is apparent that the Fourteenth Amendment will be powerless to curb abuses of power by the states. Moreover, the legislative intent of the Civil Rights Act would be thwarted.

In Lombard, the plaintiff first brought an action in state court based upon all his claims other than constitutional claims. Having lost, the plaintiff then asserted his constitutional claims in federal court. Considering the policy behind 42 U.S.C. §1983, the court held that res judicata would not bar the assertion of the constitutional claims.

In the present case, the plaintiffs DANIEL H. OVERMYER and SHIRLEY OVERMYER were drawn into state court against their will and joined in an action as co-defendant with

Overmyer Distribution Services, Inc. It is apparent that DANIEL H. OVERMYER and SHIRLEY OVERMYER did not defend upon constitutional grounds. In fact, they could not have so defended, because at that time they were unaware of the existence of the constitutional issues.

The state court pleadings that are before the court as exhibits to FIDELITY's Motion to Dismiss in the District Court conclusively show that the plaintiff in state court did not raise any of the constitutional issues herein. The complaint of FIDELITY in state court alleges no constitutional matter whatsoever. No answer was ever made to the complaint, but only a motion to dismiss. FIDELITY thereafter cross-moved for summary judgment, which was granted.

The affidavit of STANLEY ALEX SCHWARTZ in opposition to the motion for summary judgment is cited by FIDELITY as showing that the "good faith" of FIDELITY was placed in issue in state court. (Appendix, p A76 ) However, an examination of the affidavit indicates that no constitutional issues whatever are raised. In fact, the affidavit only argues that DANIEL H. OVERMYER and SHIRLEY OVERMYER do not know what happened in Texas and ought to be given a chance to conduct discovery. These allegations reinforce the plaintiffs' contentions herein that, since they did not discover the con-



stitutional issues until after the state court proceedings had concluded, they certainly could not and did not raise and litigate them on the merits.

The recent cases in the Second Circuit discussing the application of res judicata to the Civil Rights Act (42 U.S.C. §1983), despite superficial differences, can be harmonized and are essentially in accord. In all of those cases where res judicata was held to apply, the claimant voluntarily raised and litigated the constitutional issue himself in the first case. But where the claimant did not raise the issue, he preserved his rights to bring a suit in federal court. Lombard v. Board of Education of City of New York 502 F. 2d 631 (2d Cir., 1974) cert. den. 422 U.S. 1007; Newman v. Board of Education of the City School District of New York 508 F. 2d 277 (2d Cir., 1975) cert. den. 420 U.S. 1004; McCune v. Frank 521 F. 2d 1152 (2d Cir., 1975); Thistlethwaite v. City of New York 497 F. 2d 339 (2d Cir., 1974) cert. den. 419 U.S. 1093. See also Scoggin v. Schrunk 522 F. 2d 436 (9th Cir., 1975) cert. den. 423 U.S. 1066; Brault v. Town of Milton 527 F. 2d 730 (2d Cir., 1975); Stolberg v. Members of Board of Trustees for State Colleges of State of Connecticut 541 F. 2d 890 (2d Cir., 1976).

FIDELITY has alleged that the issue of the constitutional-

ity of the New York Statutes was raised in state court. (Appendix, p. A79 at para. 14). This is false. (Appendix, p. All6). The Court of Appeals herein is faced with the unseemly spectacle of two parties referring to state court pleadings, both making contrary assertions about the pleadings, and yet only some of the pleadings themselves are now before the court.

As a general rule, a court cannot take judicial notice of proceedings in a different court other than the lower court from which the appeal is taken. Palmer v. Larchmont Manor 284 N.Y. 288, 30 N.E. 2d 599 (1940); Berger v. Dynamic Imports, Inc. 51 Misc. 2d 988, 27 N.Y.S. 2d 537 (N.Y. Civ. Ct., 1966); Carter v. Carter 66 N.Y.S. 2d 768 (N.Y. Cit. Ct., 1946). A court can take judicial notice of its own records, including prior proceedings between the same parties. And while a court will not generally take judicial notice of the records of other courts, there are limits to this rule in the interest of fairness and common sense. Butler v. Eaton 141 U.S. 240, 35 L.Ed. 713 (1890).

In the present case, FIDELITY is alleging the operation of res judicata. It is incumbent on FIDELITY to introduce into evidence the pleadings that provide the alleged effect of res judicata. Failure to do so defeats their claim. Moreover,



the plaintiffs herein directly traverse the allegations of res judicata. Since FIDELITY is making a motion to dismiss, the facts that are fairly in dispute should be resolved in favor of the plaintiffs.

In light of the fact that the state pleadings themselves will resolve this dispute, all of the pleadings ought to be before the court. Plaintiffs are confident that, if this is done, their version of the prior proceedings will be shown to be accurate in all respects. Accordingly, plaintiffs request that the case be remanded so that the parties can develop the record. McCune v. Frank 521 F. 2d 1152 (2d Cir., 1975).

Plaintiff's version of the state court proceedings directly contradicts the conclusory allegations of the Motion to Dismiss. Plaintiffs summarize the state court proceedings as follows:

Complaint. Alleges indemnity agreement, affirmance of Texas action, and payment of amount of appeal bond.

Motion to Dismiss. There are no allegations in the complaint that the affirmance in Texas was a final judgment or that further appeals have been abandoned or concluded.

Cross Motion for Summary Judgment. All judgment are final and binding regardless of an appeal. Payment was



made on the bond December 7, 1973, and the Court of Civil Appeals dismissed the appeal on January 3, 1974.

Affidavit of Stanley Alex Schwartz in Opposition.

Plaintiff paid over on the appeal bond prior to the dismissal of the appeal. The indemnification agreement requires indemnity only upon a settlement in good faith. Defendants do not know what happened in the Texas action. Whether or not FIDELITY settled in good faith is a question of fact.

Reply Affidavit of Arthur Lambert. FIDELITY had to pay the money in Texas because the judgment was not stayed on appeal. Refusal to pay this obligation would subject FIDELITY to legal action and damage its reputation.

Decision of Judge Helman. Defendants have raised no issues of fact other than by suspicion or conjecture. Summary judgment granted.

Motion to Vacate Judgment and Decision of Judge Markowitz.

Defendants moved to vacate judgment on the grounds that :

1. The signature of DANIEL H. OVERMYER on the indemnity agreement is not genuine.
2. The indemnity agreement calls for indemnity for "D.H.Overmyer, Inc. (Ohio) and its subsidiaries and related companies. . ." Overmyer Distribution Services, Inc., (Delaware) is not a related company.



Judge Markowitz held that the defendants in the exercise of reasonable diligence should have raised these issues before the entry of judgment.

Motion for Stay of Enforcement and Decision of Judge Tyler.

Defendants merely alleged that the recent decision of Vail required a stay of enforcement. In this connection, the defendants admittedly erred, since Vail had been stayed by Mr. Justice Thurgood Marshall. The constitutional claims now asserted in the present federal action were neither raised, litigated, nor decided in the state action. All that was raised and decided was that Vail did not require a stay.

The affirmation of MARK D. MERMEL, which raises the simple procedural issue of whether or not Vail requires a stay, is annexed to FIDELITY's Memorandum of Law in opposition to the motion for a preliminary injunction. (Appendix, pA57 ). The very narrow issue that this affirmation raises is in sharp contrast to the sweeping significance that FIDELITY ascribes to it. (Appendix, p. A79 , at para. 14)

In Newman v. Board of Education of the City School District of New York 508 F. 2d 277 (2d Cir., 1975) cert. den. 420 U.S. 1004, the claimant did make some tangential reference to "due process" in the state proceedings. However, the court

looked at the record as a whole and decided that this brief reference to a constitutional claim, without further elaboration or argument, was insufficient to constitute such a raising of the constitutional claim that would create a bar of res judicata.

Plaintiffs submit that in any series of controversies that have been litigated as vigorously as the present ones, one who searches carefully through the extensive record is bound to find some minor reference to constitutional law. The issue is not whether the magic word "constitution" was ever uttered at any time by counsel for the plaintiffs. Rather, the issue is whether the constitutional issues of the present federal action were actually litigated and adjudicated on the merits.

If the broad, sweeping characterizations of FIDELITY in its motions and memoranda constituted the pleadings in the state court action, then FIDELITY would have established its point. However, it is not enough for FIDELITY to unilaterally define what the state court action means. FIDELITY needs to put these pleadings in evidence. In fact, the few pleadings that FIDELITY has shown the court support the statement of plaintiffs (Appendix, p. All6 ) and contradict the sweeping, conclusory allegations made by FIDELITY (Appen-



dix, p. A79 ).

As the recent cases indicate, the doctrine of res judicata should not be applied to bar an action under 42 U.S.C. §1983 in federal court, when the claimant did not voluntarily raise his constitutional claims in the prior state court proceeding. A basic reason for the enactment of 42 U.S.C. §1983 was the apprehension that the states would not abide by the United States Constitution and would disregard the Bill of Rights. Subsequent experience has shown that the states persist in drafting and enforcing unconstitutional laws.

It is apparent that the federal review provided by 42 U.S.C. § 1983 is badly needed, since the Supreme Court cannot be expected to review every abuse of state power by certiorari. The holding of the court below does serious damage to the policy of Monroe v. Pape 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed. 2d 492 (1961) by restricting the availability of the federal remedy. Moreover, the holding of the District Court violates the principle that res judicata only bars a 42 U.S.C. § 1983 action in federal court when the claimant voluntarily raised and litigated the constitutional issue in state court. Lombard v. Board of Education of City of New York 502 F. 2d 631 (2d Cir., 1974) cert. den. 422 U.S. 1007; Newman v. Board

of Education of the City School District of New York 508

F. 2d 277 (2d Cir., 1975) cert. den. 420 U.S. 1004; McCune

v. Frank 521 F. 2d 1152 (2d. Cir. 1975); Thisthethwaite v.

City of New York 497 F. 2d 339 (2d Cir., 1974) cert. den.

419 U.S. 1093.



COLLATERAL ESTOPPEL DOES NOT  
BAR THE PRESENT ACTION.

In all respects the cause of action in the state court differed from the causes of action in the federal court. If the defendants seek to demonstrate a connection between the two actions, then the only possible avenue for analysis is the related doctrine of collateral estoppel. The distinction between res judicata and collateral estoppel, while it has been enunciated many times by the courts, seems to have eluded the defendants.

As plaintiffs pointed out in the court below, the doctrine of res judicata only applies where the causes of action are identical. (See A-116 et seq.) Where, as here, the second lawsuit is founded upon a different cause of action, the doctrine of collateral estoppel may apply, but only where the issue in question was actually litigated and determined on the merits in the first proceeding. Under the doctrine of collateral estoppel, "the parties are free to litigate points which were not at issue in the first proceeding ...". Commissioner v. Sunnen 333 U.S. 591, 68 S. Ct. 715, 92 L. Ed. 898 (1948).

Accordingly, it has been observed that collateral estoppel requires the presence of several basic elements:

(1) the issue presented in the first action is identical with the issue in the second action; (2) the issue was actually litigated; (3) the issue was essential to the determination of the first action; (4) the issue was "ultimate"; and (5) there was a full and fair opportunity to contest the decision. Vincent v. Thompson 50 A.D. 2d 211, 377 N.Y.S. 2d 118 (2d Dep., 1975); Playtog's Factory Outlet v. County of Orange 51 A.D. 2d 772, 379 N.Y.S. 2d 859, 865 (2d Dep., 1976) (Shapiro, J., concurring).

In the present case, the issues presented in the federal action could not possibly be identical with the issues presented in the state court action. Since the facts surrounding the Texas proceedings were not discovered until recently, the issues that were raised in state court are completely dissimilar from the issues that are raised now.

In addition, the constitutional claims were not actually litigated in state court. Throughout the state court action, DANIEL H. OVERMYER and SHIRLEY OVERMYER maintained their need to conduct discovery so that they could find out what happened in the Texas proceedings. They were never aware of any constitutional claims.

The only issues essential to the determination of the first action were contractual issues. The state court could



and did find that Overmyer Distribution Services, Inc., DANIEL H. OVERMYER and SHIRLEY OVERMYER were liable on the alleged contract without any reference to the constitutionality of certain state laws. In the state court the contractual issue was the ultimate issue, whereas in federal court the contractual issue is not presented.

Finally, there was no "full and fair opportunity" for plaintiffs to contest the decision in the first action because of the fraud and misconduct of FIDELITY that has recently come to light. As Mr. Justice Shapiro has stated, "Collateral estoppel cannot be indiscriminately applied and must be viewed in each case...to see that its invocation does not infringe upon basic fairness and due process."

Playtogs Factory Outlet v. County of Orange 51 A.D. 2d 772, 379 N.Y.S. 2d 859 (2d Dep., 1976) (concurring opinion).

A PRELIMINARY INJUNCTION  
IS WARRANTED.

Plaintiffs herein request that the court grant, pending a hearing and determination by the three-judge court, a preliminary injunction restraining defendant, their successors, agents and employees, and all persons acting in concert and participation with them, from continuing to cause irreparable harm to plaintiffs by enforcing or threatening to enforce supplementary and civil contempt proceedings under Article 19 of the New York State Judiciary Law and by threatening to apprehend and commit plaintiff DANIEL H. OVERMYER. The relief sought by plaintiffs is authorized by the All Writs Act (28 U.S.C. §1651) which provides in part: "The Supreme Court and all courts established by Acts of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." Moreover, the relief sought by plaintiffs is in accord with F.R.C.P. 62 (g): "The provisions in this rule do not limit any power of an appellate court or of a judge or justice thereof. . . to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered."



Wherever a stay is sought on appeal pursuant to Rule 62, the courts have required that the party first apply to the District Court. In the instant case such an application was made by plaintiffs at a conference before Judge Milton Pollack on November 16, 1976. At that time, Judge Pollack indicated that plaintiffs need not make a formal motion and denied plaintiff's request without opinion.

Absent a preliminary injunction restraining the defendants from acting under the allegedly unconstitutional statutes, the defendants would be free to take those actions that are noted in this brief. Hence a preliminary injunction is needed to maintain the status quo and to protect the rights of the plaintiffs.

CONCLUSION

The judgment of the court below should be reversed and a three-judge district court convened pursuant to 28 U.S.C. §2281 and 2284 to determine this controversy. Pending a hearing and determination by the three-judge court, a preliminary injunction should be granted restraining defendants, their successors, agents and employees, and all persons acting in concert and participation with them, from continuing to cause irreparable harm to plaintiffs by enforcing or threatening to enforce supplementary and civil contempt proceedings under Article 19 of the New York State Judiciary Law and by threatening to apprehend and commit plaintiff DANIEL H. OVERMYER.

Respectfully submitted,

Easton & Echtman, P.C.

Of Counsel:  
Irwin M. Echtman, Esq.



## ADDENDUM

### New York Judiciary Law

#### §756. ISSUE OF WARRANT WITHOUT NOTICE

Where the offense consists of a neglect or refusal to obey an order of the court, requiring the payment of costs, or of a specified sum of money, and the court is satisfied, by proof, by affidavit, that a personal demand thereof has been made, and that payment thereof has been refused or neglected; it may issue, without notice, a warrant to commit the offender to prison, until the costs or other sum of money, and the costs and expenses of the proceeding, are paid, or until he is discharged according to law.

#### §757. ORDER TO SHOW CAUSE, OR WARRANT TO ATTACH OFFENDER

The court or judge, authorized to punish for the offense, may, in its or his discretion, where the case is one of those specified in either section seven hundred and fifty-five or seven hundred and fifty-six, and, in every other case, must, upon being satisfied, by affidavit, of the commission of the offense, either

1. Make an order, requiring the accused to show cause before it, or him, at a time and place therein specified, why

the accused should not be punished for the alleged offense; or

2. Issue a warrant of attachment, directed to the sheriff of a particular county, or, generally, to the sheriff of any county where the accused may be found, commanding him to arrest the accused, and bring him before the court or judge, either forthwith, or at a time and place therein specified, to answer for the alleged offense.

Where the order to show cause, or the warrant, is returnable before the court, it may be made, or issued, as prescribed in this section, by any judge authorized to grant an order without notice, in an action pending in the court; and it must be made returnable at a term of the court, at which a contested motion may be heard.

#### §765. EXECUTION OF WARRANT WHEN UNDERTAKING NOT GIVEN

If an indorsement is not made upon the warrant, as prescribed in section seven hundred and sixty-four; or if such an indorsement is made and an undertaking is not given, as prescribed in section seven hundred and sixty-six; the sheriff, after making the arrest, as required by the warrant, must keep the accused in his custody, until the further direction of the court, judge, or referee. Where, from sickness or any other cause, the accused is physically unable to



attend before the court, judge, or referee, that fact is a sufficient excuse to the sheriff for not producing him as required by the warrant. In that case, the sheriff must produce him, as directed by the court, judge, or referee, after he becomes able to attend. The sheriff need not, in any case, confine the accused in prison, or otherwise restrain him of his liberty, except as far as it is necessary so to do, in order to secure his personal attendance.

#### §767. WHEN HABEAS CORPUS MAY ISSUE

If the accused is in the custody of a sheriff, or other officer, by virtue of an execution against his person, or by virtue of a mandate for any other contempt or misconduct, or a commitment on a criminal charge, a warrant of attachment can not be issued. In that case, the court, upon proof of the facts, must issue a writ of habeas corpus, directed to the officer, requiring him to bring the accused before it, to answer for the offense charged. The officer to whom the writ is directed, or upon whom it is served, must, except in a case where the production of the accused under a warrant of attachment would be dispensed with, bring him before the court, and detain him at the place where the court is sitting, until the further order of the court.



§770. FINAL ORDER DIRECTING PUNISHMENT; EXCEPTION

If it is determined that the accused has committed the offense charged; and that it was calculated to, or actually did, defeat, impair, impede, or prejudice the rights or remedies of a party to an action or special proceeding, brought in the court, or before the judge or referee; the court, judge, or referee must make a final order directing that he be punished by fine or imprisonment, or both, as the nature of the case requires. A warrant of commitment must issue accordingly, except where an application is made under this article and in pursuance of section two hundred forty-five of the domestic relations law or any other section of law for a final order directing punishment for failure to pay alimony and/or counsel fees pursuant to an order of the court or judge in an action for divorce or separation and the husband appear and satisfy the court or a judge before whom the application may be pending that he has no means or property or income to comply with the terms of the order at the time, the court or judge may in its or his discretion deny the application to punish the husband, without prejudice to the wife's rights and without prejudice to a renewal of the application by the wife upon notice and after proof that the financial condition of the husband is changed.



#### §771. PUNISHMENT UPON RETURN OF HABEAS CORPUS

Where the accused is brought up by virtue of a writ of habeas corpus, he must, after the final order is made, be remanded to the custody of the sheriff, or other officer, to whom the writ was directed. If the final order directs that he be punished by imprisonment, or committed until the payment of a sum of money, he must be so imprisoned or committed, upon his discharge from custody under the mandate, by virtue of which he is held by the sheriff, or other officer.

#### §772. PUNISHMENT UPON RETURN OF ORDER TO SHOW CAUSE

Upon the return of an order to show cause, the questions which arise must be determined, as upon any other motion; and, if the determination is to the effect specified in section seven hundred and seventy, the order thereupon must be to the same effect as the final order therein prescribed. Upon a certified copy of the order so made, the offender may be committed, without further process.

#### §773. AMOUNT OF FINE

If an actual loss or injury has been produced to a party to an action or special proceeding, by reason of the misconduct proved against the offender, and the case is not one where it is specially prescribed by law, that an action may

be maintained to recover damages for the loss or injury, a fine, sufficient to indemnify the aggrieved party, must be imposed upon the offender, and collected, and paid over to the aggrieved party, under the direction of the court. The payment and acceptance of such a fine constitute a bar to an action by the aggrieved party, to recover damages for the loss or injury. Where it is not shown that such an actual loss or injury has been produced, a fine must be imposed, not exceeding the amount of the complainant's costs and expenses, and two hundred and fifty dollars in addition thereto, and must be collected and paid, in like manner. A corporation may be fined as prescribed in this section.

§774. LENGTH OF IMPRISONMENT AND PERIODIC REVIEW OF PROCEEDINGS

1. Where the misconduct proved consists of an omission to perform an act or duty, which is yet in the power of the offender to perform, he shall be imprisoned only until he had performed it, and paid the fine imposed, but if he shall perform the act or duty required to be performed, he shall not be imprisoned for the fine imposed more than three months if the fine is less than five hundred dollars, or more than six months if the fine is five hundred dollars or more. In such case, the order, and the warrant of commitment,



if one is issued, must specify the act or duty to be performed, and the sum to be paid. In every other case, where special provision is not otherwise made by law, the offender may be imprisoned for a reasonable time not exceeding six months, and until the fine, if any, is paid; and the order, and the warrant of commitment, if any, must specify the amount of the fine, and the duration of the imprisonment. If the term of imprisonment is not specified in the order, the offender shall be imprisoned for the fine imposed three months if the fine is less than five hundred dollars, and six months if the fine imposed is five hundred dollars or more. If the offender is required to serve a specified term of imprisonment, and in addition to pay a fine, he shall not be imprisoned for the nonpayment of such fine for more than three months if such fine is less than five hundred dollars or more than six months if the fine imposed is five hundred dollars or more in addition to the specified time of imprisonment.

2. In all instances where any offender shall have been imprisoned pursuant to article nineteen of the judiciary law and where the term of such imprisonment is specified to be an indeterminate period of time or for a term of more than three months, such offender, if not then discharged by law

from imprisonment, shall within ninety days after the commencement of such imprisonment be brought, by the sheriff, or other officer, as a matter of course personally before the court imposing such imprisonment and a review of the proceedings shall then be held to determine whether such offender shall be discharged from imprisonment. At periodic intervals of not more than ninety days following such review the offender, if not then discharged by law from imprisonment, shall be brought, by the sheriff, or other officer, as a matter of course personally before the court imposing such imprisonment and further reviews of the proceedings shall then be held to determine whether such offender shall be discharged from imprisonment. Where such imprisonment shall have arisen out of or during the course of any action or proceeding, the clerk of the court before which such review of the proceedings shall be held, or the judge or justice of such court in case there be no clerk, shall give reasonable notice in writing of the date, time and place of each such review to each party or his attorney who shall have appeared of record in such action or proceeding, at their last known address.



§775. WHEN COURT MAY RELEASE OFFENDER

Where an offender, imprisoned as prescribed in this article, is unable to endure the imprisonment, or to pay the sum, or perform the act or duty, required to be paid or performed, in order to entitle him to be released, the court, judge, or referee, or, where the commitment was made to punish a contempt of court committed with respect to an enforcement procedure under the civil practice law and rules, the court, out of which the execution was issued, may, in its or his discretion, and upon such terms as justice requires, make an order, directing him to be discharged from the imprisonment.